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No. 159

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant in Error.

In Error to the Supreme Court of the State of South Carolina.

At Columbia, S. C.

MOTION TO DISMISS OR TO AFFIRM

AND

BRIEF OF ARGUMENT FOR THE MOTION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 729.

THE COLUMBIA WATER POWER COMPANY,
PLAINTIFF IN ERROR,

versus

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of South Carolina, at Columbia, S. C.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 729.

The Columbia Water Power Company, Plaintiff in Error,

Against

The Columbia Electric Street Railway, Light and Power Company, Defendant in Error.

Now comes the Defendant in Error, by its Counsel appearing in that behalf, and moves the Court to dismiss the Writ of Error in the above entitled cause for want of jurisdiction, because the judgment brought up on said Writ of Error is the judgment of the Supreme Court of the State of South Carolina, sitting at Columbia, S. C., and it appears that no Federal question was involved in said judgment and the decision of said cause.

And the said Defendant in Error, by Counsel as aforesaid, also moves the Court to affirm the judgment brought up by said Writ of Error, because, although the record of said cause may show that this Court has jurisdiction in the premises, it is manifest that said question involved was frivolous, and that said Writ of Error was sued out for delay only.

JOHN T. SLOAN,
WM. H. LYLES,

Counsel for Defendant in Error for the Purposes of These Motions Only.

Supreme Court of the United States.

OCTOBER TERM, 1896.

The Columbia Water Power Company, Plaintiff in Error,

Against

The Columbia Electric Street Railway, Light and Power Company, Defendant in Error.

To Leroy F. Youmans, Esq., Attorney for Plaintiff in Error:

Please take notice that on Monday, the 3rd day of May, A. D. 1897, at the opening of the Court, or as soon thereafter as Counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of said Court thereon. Annexed hereto is a copy of the brief of Argument to be submitted with said motions in support thereof.

JOHN T. SLOAN,
WM. H. LYLES,

Counsel for Defendant in Error for the Purposes of These Motions Only.

ABSTRACT OF CASE.

Prior to the 24th day of December, 1887, the State of South Carolina was the owner of the Columbia Canal and its appurtenances, which was in the custody of the Board of Directors of the South Carolina Penitentiary, in process of development. By an Act of the General Assembly approved on that day, 19 Stats., page 1,090, entitled "An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the Said Board the Columbia Canal with the Lands now Held Therewith and Its Appurtenances and to Develop the Same," it was provided:

"Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Board of Directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the Board of Trustees of the Columbia Canal, hereinafter created and provided for the property known as the Columbia Canal, together with the lands now held therewith, acquired under the Acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said Board of Trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this Act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the

said Board of Trustees and their assigns: Provided, That should the said canal not be completed to Gervais street within seven years from the passage of this Act all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State."

* * * * * * * * * *

"Section 7. That the Board of Trustees shall, within two years from the ratification of this Act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and 10 feet deep, from the source of the canal down to Gervais street, and furnish to the State, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is practicable, complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch: Provided, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right."

* * * * * * * * * *

"Section 21. The said Board of Trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be 'Board of Trustees of the Columbia Canal.' Its officers shall be a Chairman and a Secretary and Treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell or lease lands adjoining the canal useful for the purposes of the canal; may sell or lease the water power of the canal, subject to

such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power at the Penitentiary, and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded, under their corporate name, and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the Secretary and Treasurer as they may deem proper."

Section 23 of this Act was amended by an Act of the General Assembly approved the 24th day of December, 1890, 20 Stats., page 967, entitled "An Act to Amend an Act Entitled 'An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the Said Board the Columbia Canal, with the Lands Now Held Therewith and Its Appurtenances, and to Develop the Same,' Approved December 24th, 1887," so as to read as follows, to wit:

"Section 23. That the said Board of Trustees, as soon as they have fully developed the said canal and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said Board of Trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this Act on said Board of Trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said board prior to such sale and transfer, upon the approval and consent of nine members of the City Council of the city of Columbia; and before such sale, alienation and transfer is made, thirty

days' notice of the offer to purchase and the terms thereof shall be given to the Council of the city of Columbia."

On the 11th day of January, 1892, the Board of Trustees so created by the aforesaid Act, pursuant to its provisions, conveyed the canal and its appurtenances to the Plaintiff in Error.

On the 26th day of May, 1892, the Board of Directors of the South Carolina Penitentiary entered into a contract with Defendant in Error which contained the following provisions, to wit:

"Whereas, at a regular meeting of the Board of Directors of the South Carolina Penitentiary, held in the city of Columbia on the 17th day of May, A. D. 1892, the following resolution was unanimously adopted, to wit:

" 'Whereas, under the Acts of General Assembly providing for the transfer of the Columbia Canal to the Board of Trustees, and authorizing the sale thereof by said Board of Trustees, there was reserved for the State of South Carolina, for the use of the South Carolina Penitentiary, 500 horse power on the line of the said canal; and whereas, to utilize said water power and make the same available for the purposes of the Penitentiary, it would require the expenditure of a large sum of money, which has not been provided for; and

" 'Whereas, the Columbia Electric Street Railway, Light and Power Company, in consideration of the privileges, uses and enjoyments hereinafter expressed, has offered to develop the same for the Penitentiary, and the said proposition is deemed greatly to the advantage of the State of South Carolina, and also of the Penitentiary; now, therefore, be it resolved—' "

* * * * * * * * * *

"Now, therefore, know all men by these presents:

"First. That the said the Columbia Electric Street Railway, Light and Power Company, party of the second part, in con-

sideration of the premises, and in consideration of the rights, privileges and immunities hereinafter set forth, covenants and agrees, at its own cost and expense, to build, erect and complete on the western bank of the Columbia Canal, opposite the South Carolina Penitentiary, at or near the point where the water wheel of the South Carolina Penitentiary formerly stood, all necessary bulk-heads, water-ways, water-gates, tail-races, mason work and buildings, and to erect suitable water wheels thereon of the most modern and improved patterns, of sufficient capacity to utilize and develop the said 500 horse power of water power; the said work to be completed and ready for use within twelve months after the execution of this contract; and the said party of the second part further covenants and agrees, at its own cost and expense, to maintain and operate the said water wheels for the development and utilization of the said 500 horse power of water power for and during the continuation of this contract. And the said party of the second part further covenants and agrees to transmit across the said Columbia Canal, to some convenient point within the walls of the said Penitentiary, to be indicated by the superintendent thereof, so many horse power, not to exceed the sum of 100 horse power, for the use and benefit of the said South Carolina Penitentiary; the said power to be delivered, when required by the party of the first part, at the point above indicated, from electric generators, or in such other form as the party of the second part may elect."

* * * * * * * * * * *

"Second. That the said party of the first part, on behalf of the Board of Directors of the South Carolina Penitentiary, covenants and agrees to allow to the said party of the second part, for the purpose of the development of the said water power, the use and enjoyment of all the right, title and interest that the State of South Carolina and the Board of Directors of the South Carolina Penitentiary, by reason of the Acts

of the Legislature hereinbefore referred to, have in and to all the land on the west side of the Columbia Canal, between the said canal and the river opposite the walls of the said Penitentiary, for and during the term of this contract. And the said party of the first part further covenants and agrees with the party of the second part, that the right, title and interest so conveyed is sufficient for the erection of the said bulkheads, water-ways, water-gates, tail-races and buildings; and further agrees to allow to the said party of the second part, to be used in the erection of the said work, all the stone masonry and other material now on the said land, together with the privilege of quarrying and using such other stone, earth and other material as may be necessary for the erection and proper execution of said work; and the party of the first part further covenants and agrees that the said party of the second part shall have, for and during the continuation of this contract, the free and uninterrupted use and enjoyment of the right of way along the banks of the said canal to and from Gervais street to the works so to be erected. And the party of the first part, in consideration of the covenants and agreements by and on the part of the party of the second part, hereby further covenants and agrees to allow the said party of the second part the free and uninterrupted use of the said 500 horse power of water power so reserved by the State of South Carolina for the use of the South Carolina Penitentiary, saving and excepting the 100 horse power of water power so reserved for the use of the Penitentiary, as hereinbefore stated.

"Third. And the said party of the second part, in consideration of the premises, and further in consideration of the use of the said 500 horse power of water power, hereby covenants and agrees to pay to the said party of the first part the sum of $2,500 per annum for each and every year during the continuation of this contract, commencing when said work shall have been completed and ready for use, less a deduction of $5

per horse power for each and every horse power transmitted in the manner and the form aforesaid by the party of the second part for the use of the party of the first part—the said payments to be made in monthly instalments and payable at the end of each and every month.

"Fourth. And it is mutually agreed by and between the parties hereto that this contract shall continue and be of force for and during the period of thirty years from the date of the execution of the contract; provided, however, that at the expiration of said period this contract may be continued upon such terms as may be mutually agreed upon by and between the parties thereto; and in the event that the said contract be not continued, the said party of the second part shall have the right, within six months after the expiration of said contract, to remove the water wheel and all other machinery by the said party of the second part furnished and erected under the terms of this contract; leaving, however, for the use of the said Penitentiary all mason work, bulk-heads; water-ways, tail-races and buildings which shall have been erected."

By an Act of the General Assembly approved December 24th, 1892, 21 Stats., page 94, entitled "An Act to Ratify and Confirm the Contract Made and Entered Into by and Between the Board of Directors of the South Carolina Penitentiary and the Columbia Electric Street Railway, Light and Power Company for the Development of the Five Hundred Horse Power of Water Power Reserved by the State of South Carolina for the Use of the South Carolina Penitentiary, Along the Line of the Columbia Canal," it was enacted:

"Whereas, at a regular meeting of the Board of Directors of the South Carolina Penitentiary, held in the city of Columbia on the 17th day of May, A. D. 1892, a resolution was unanimously adopted authorizing and instructing the Superintendent of the South Carolina Penitentiary, on behalf of the said Board, to enter into a contract with the Columbia Elec-

tric Street Railway, Light and Power Company for the development and utilization of the 500 horse power of water power reserved by the State of South Carolina for the use of the South Carolina Penitentiary, along the line of the Columbia Canal; and, whereas, the Superintendent of the South Carolina Penitentiary, pursuant to the said resolution of the said Board, did, on the 26th day of May, A. D. 1892, execute a contract with the said the Columbia Electric Street Railway, Light and Power Company, for the development and utliization of the said water power upon certain terms expressed in the said contract; and, whereas, the said the Columbia Electric Street Railway, Light and Power Company, pursuant to the said contract, has erected extensive mason work, and has placed thereon water wheels for the development of the said 500 horse power of water power, and erected thereon all necessary buildings, shafting etc., with all necessary water wheels, gateways and other structure for the complete development and use of the said water power, and has in all other respects fully complied with the terms of the said contract; now, therefore,

"Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said contract by and between the Board of Directors of the South Carolina Penitentiary, and the Columbia Electric Street Railway, Light and Power Company, for the development of the said water power, be, and the same is hereby, ratified and confirmed, subject, however, to all of the conditions, limitations and restrictions in the said contract provided."

This action was duly commenced by the Plaintiff in Error against the Defendant in Error in the Court of Common Pleas for the County of Richland and State of South Carolina, the Complaint alleging the aforesaid Statutes, Deed and Contract, and concluding with the prayer for an injunction, etc.

The Defendant in Error filed its Answer, which contained the following amongst other matters:

"III. It denies that the 500 horse power of water required to be furnished to the State of South Carolina was provided solely for the purpose of use by the State itself in its public institutions, and denies that it was not intended or provided for any use that the State of South Carolina might choose to put the same to. On the contrary, it alleges that by an Act of the General Assembly, referred to in said complaint as constituting the Board of Trustees of the Columbia Canal, it was expressly provided that said board should 'furnish to the State, free of charge, on the line of the canal, 500 horse power of water power: Provided, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of said canal by the Board of Trustees, or their assigns, shall always be subject to this right.'"

The cause came on to be tried, and resulted in the following Decree:

"This cause came on to be heard before me at the present term of the Court, and has been fully argued.

"As to the question raised that the Court has no jurisdiction because that the State is an indispensable party, this plea is overruled. The Court has jurisdiction. The defendant is a lessee of the water power reserved by the State, and the Court can construe a contract made between the defendant and the State, whereby it is claimed that the rights of the plaintiff have been affected. The door is not shut to plaintiff because of the contract with the State; the State has a right to come in if she so wishes; but she declares that she will not come in, and the cause can be heard without her presence.

"As to the Rawls deed, that deed conveys the property to the State; but subsequently the State conveyed the canal property to the plaintiff, and thereby conveyed in fee all of the

property known as the 'canal property,' including its banks, as it existed at the time of the conveyance; and at the time of the Act of 1887, and of the conveyance made thereunder, the canal property covered the land upon which the defendant's works are erected.

"Plaintiff acquired its rights under the Act of 1887. It is not the grantor of anything to the State, but the State has reserved out of its grant 500 horse power of water power, and that much plaintiff did not purchase. The whole question turns on the reserved right of the State. The defendant holds a lease from the State, and the contract made by defendant with the Board of Directors of the State Penitentiary, approved and ratified by the State, has given to the defendant all of the rights which the State had in that 500 horse power. In the Act of 1887 there is a distinct reservation of an absolute right to the State of 500 horse power of water power. Call it an easement, or what you will, it is absolute. Now, can the State dispose of it? Unquestionably she can. She can develop it; she can erect the necessary buildings for its utilization, and can utilize it. She may do it in any way she pleases. She may use old wheels, or she may use new and improved methods, and may resort to electricity, which is now generally regarded as an improved method of transmitting water power; therefore, there is no objection to the electric plant erected by the defendant under its contract with the State.

"Now, can the State lease its power, and permit the lessee to use it, and supply the State at the cost of the lessee? I think it can. The State is not always ready for carrying on such work; therefore, she could lease it; and, in this particular case, the State gets, or may get, 100 horse power and the lessee the balance. This being a consideration moving to the lessee, the lessee can devote that consideration to its own use; therefore, under the Act, the defendant, as lessee of the State, has the unquestionable right to put the electric plant on the

banks of the canal of the Penitentiary and to carry out the contract which has been made between it and the State of South Carolina.

"Now, has the defendant the supplementary right to put in a steam plant? Prudence and foresight justifies its erection on the banks of a canal along a river where freshets come; and where time is important, there might be serious interruption to the industries of the defendant company, and thus of the Penitentiary; therefore, the defendant has a right to use so much steam plant as is necessary to supplement its water power at such times as the water power is unavailable by reason of freshets or necessary repairs to the canal, or other causes. The dam may break, rains may swell the river, and there might be a long interruption to the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water power plants. The defendant cannot erect any more steam plant than is necessary for it to use as a supplement to the water power which it has received from the State.

"I, therefore, hold that there has been no violation of the State's contract with the plaintiff. That reservation of the State's water power is a part of the contract made with the plaintiff, and that reservation is absolute. Therefore, I hold that the complaint must be dismissed.

"It is, therefore, ordered and adjudged that the complaint be dismissed. J. H. HUDSON,

"November 11, 1893. Presiding Judge."

An appeal from this Decree was duly taken to the Supreme Court, the Court of last resort in the State of South Carolina, where the judgment of the Court below was affirmed, in an opinion containing the following language, to wit:

"Having reached the conclusion that the State is not an indispensable party in determining this cause of action, the next question for consideration is, whether or not the contract be-

tween the State and the defendant, relative to the 500 horse power of water power, is null and void. This contract received legislative construction when it was ratified by the Act of the Legislature hereinbefore mentioned, and although such construction is not binding on this Court, still it shows the intention of the State when it reserved the 500 horse power of water power. We think the construction placed upon said contract in 1892 by the Legislature as to the 500 horse power reserved to the State, was in harmony with the terms of said contract—the proviso to section 7 of the Act of 1887 being that the right of the State to the free use of the said 500 horse power should be absolute. The use of the word 'absolute' was for the purpose of creating a right in the State to this 500 horse power, separable and distinct from ownership in other lands, and not dependent upon any particular lands to which it may be appurtenant. This reservation was a right of profit a prendre."

The opinion then quotes at length from the language of Campbell, Chief Justice, in Hall vs. City of Ionia, 38 Mich., 423, and of Foster, J., in Goodrich vs. Burbank, 12 Allen, 459, and proceeds:

"The following authorities will also throw light upon this subject: Tinicum Fishing Co. vs. Carter, 61 Penn. St., 39; 19 Am. & Eng. Enc. Law, 259; Gould on Waters, section 299, p. 562; Poull vs. Mockley, 33 Wisc., 482; Washburn's Easements & Servitudes, sections 12, 12a; Angell on Watercourses, section 143. We are of opinion that the contract between the State and the defendant was not null and void.

"It is contended that said contract did not confer upon the defendant the right to erect the steam plant. This depended upon the fact whether it was merely incidental to, and essential to, the enjoyment of the use of the water power plant. The parties of the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand

was made therefor on Circuit, nor is there an exception raising such question. This Court must assume that the Circuit Judge properly decided all questions of fact upon which his judgment had necessarily to rest. Even if there was error on his part in his findings of fact, it is not the subject of review by this Court in a law case. This Court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water power plant, and essential to the enjoyment of its use. For the same reason we cannot review his Honor's finding of fact, in effect, that the plaintiff is owner in fee of the land described in the complaint, subject to the right of the State to the 500 horse power of water power.

"These views render it unnecessary to decide specifically the other exceptions herein.

"It is the judgment of this Court, that, for the reasons herein set forth, the judgment of the Circuit Court be affirmed."

See 43 S. C., 169.

The Plaintiff in Error bases its assignment of Errors upon a single ground, as follows, to wit:

"That error was committed in deciding in favor of the validity of the contract between the defendant and the Board of Directors of the South Carolina Penitentiary, May 26, 1892, and the Act of the General Assembly of the State of South Carolina, December 24, 1892, ratifying and confirming the same, which were drawn in question, on the ground of their being repugnant to the Constitution of the United States of America in this, that they impaired the obligation of the contract made with the State of South Carolina, December 24, 1887, as to the rights, franchises and privileges of the plaintiff as the owner in fee of the property known as 'The Columbia Canal,' and more especially as to the plaintiff's sole and exclusive right, franchise and privilege to sell and lease the

water power developed by said canal, and as to the 500 horse power of water power to be furnished to the said State, and in this that they deprived the plaintiff of its property without due process of law."

GROUNDS OF MOTION.

I.

Defendant in Error submits that the judgment of the Supreme Court of the State of South Carolina, based upon a construction of the Act of 1887, under which both parties claim involved no Federal question and that this Court has no jurisdiction of the cause.

II.

Defendant in Error also submits that although the record may show that this Court has jurisdiction, it is manifest that the Writ of Error was sued out for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

ARGUMENT.

It is settled beyond controversy by an unbroken line of decisions of this Court that "if it appear either that the decision of the State Court was made upon rules of general jurisprudence, or that the case was disposed of upon other grounds broad enough in themselves to sustain the judgment without considering the Federal question, and that such question was not necessarily involved, the jurisdiction of this Court will not attach." City of New Orleans vs. New Orleans Water Works Co., 142 U. S., 79. And in the same case it was ruled that "Before this Court can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment." See

also Hammond et al. vs. Johnston, Rec., 142, U. S., 73, and Beaupre vs. Noyes, 138 U. S. 397.

Testing the case at bar by this rule, what do we find? That the Supreme Court of South Carolina did not pass upon the Act of 1892, under which the Federal question is sought to be raised, at all, but based its decision solely upon the Act of 1887, under which both parties claimed. It held that when the Legislature by section 7 of that Act provided that the Trustees should "furnish to the State, free of charge, on the line of the canal, 500 horse power of water power. * * * Provided, the right of the State to free use of said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the Board of Trustees, or their assigns, shall always be subject to this right," it meant that the right should be absolute, and that the Board of Trustees could never transfer any interest in the canal which would prevent the State from disposing of that reserved right as it saw fit; and, of course, the Plaintiff in Error, in its purchase from the Board of Trustees, can show no contract or right as to the 500 horse power so reserved entitled to the protection of the Federal Constitution. So far from the Court basing its decision upon the Act of 1892, that Act was only incidentally mentioned, and the Court clearly indicated that it did not consider that it had any effect upon any right which the Plaintiff in Error had at the time of its passage.

JOHN T. SLOAN,
WM. H. LYLES,
Counsel for Defendant in Error.

No. 317.

APR 15 1898
JAMES H. McKENNEY,
CLERK

BRIEF OF ARGUMENT OF WM. H. LYLES FOR DEFENDANT IN ERROR.

Brief of Lyles for D. C.

Filed April 15, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 317.

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error,

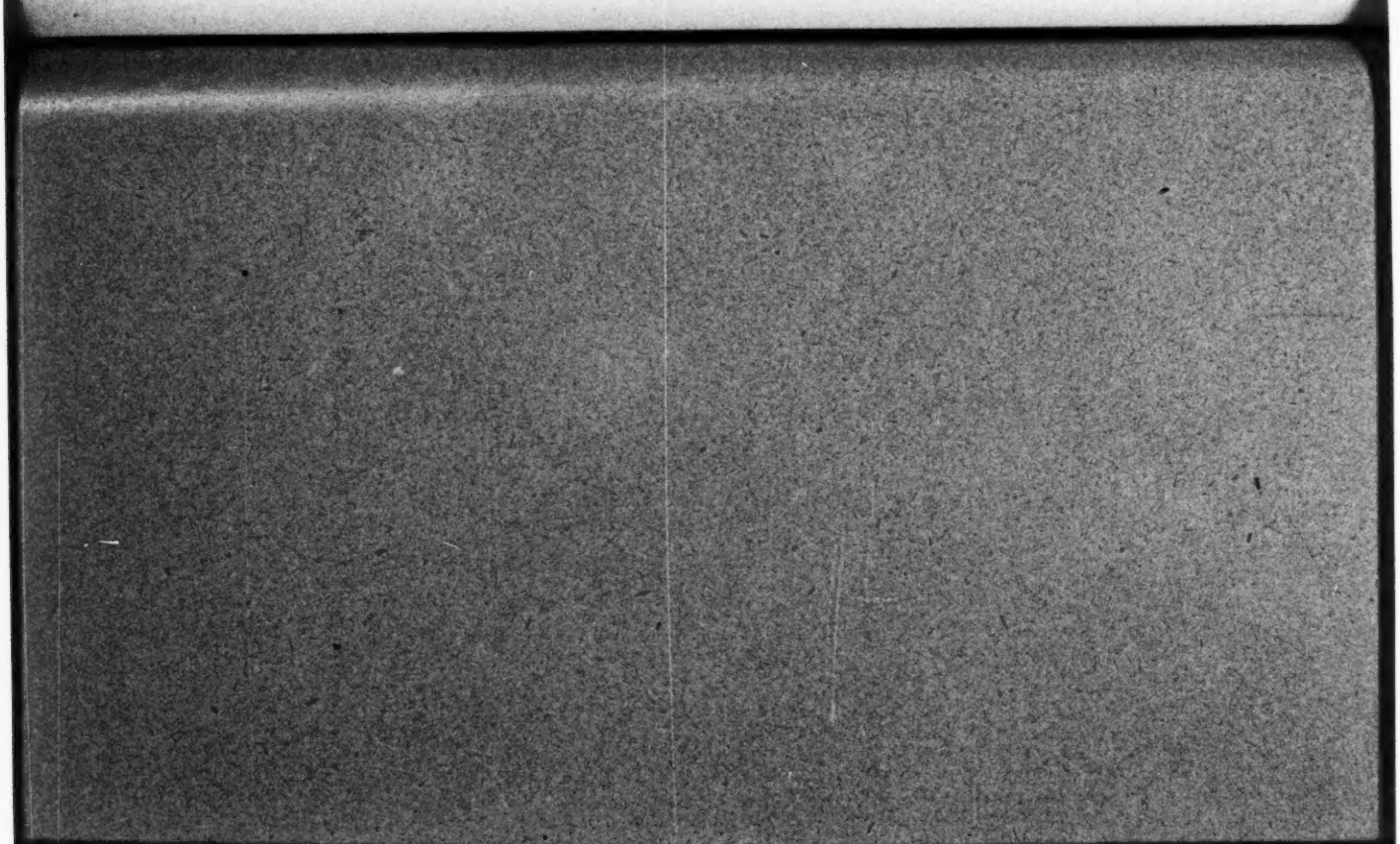
vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of South Carolina.

RECORD FILED MARCH 8th, 1897.

(16,508.)



(16,508.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

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THE COLUMBIA WATER POWER COMPANY,
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ABSTRACT OF CASE.

The questions involved in this case are two:

1. Whether the defendant in error had the right to erect a steam plant on or near the banks of the Columbia canal as a necessary adjunct to a water power plant there erected by it.

2. Whether it has the right to make use of 500 horse power of water power reserved by the State of South Carolina and developed by the defendant corporation under a contract with the State.

The following are the facts:

The plaintiff in error relies upon the act of 1887, but it alleges in its complaint that it recognized and admitted the right of the State to the use of the 500 horse power of water power for the purposes of the penitentiary, and the right of the defendant to erect the works in question so far as they were intended to develop the water power itself. The only questions, then, which presented themselves upon the merits of the case for consideration in the courts below are those stated above.

The works erected by the defendant as a power station are located on the north side of Blanding street in the city of Columbia, between the canal and Congaree river, opposite the wall around the penitentiary grounds, upon land originally purchased from Thomas J. Rawls by the State of South Carolina, October 18th, 1866, for the use of the penitentiary. This land is within the boundaries described in the Act of the General Assembly of the State of South Carolina, approved February 9th, 1882, 17 Stats., 873, as "All that tract of land measuring and containing about forty-five acres, and lying between the canal and the Congaree river, and between Neagle's bridge and Broad River bridge, together with certain small islands adjacent thereto." The State had previously acquired from Elisha Daniels, a former owner of the Rawls land, for the purposes of the Columbia canal, a strip of land forty feet wide measured each way from the centre line of the canal as it then existed, through the land afterwards conveyed by Rawls to the State, but this

strip did not touch the site of the works in question, the subsequent widening of the canal having taken up more than the original eighty feet. The works, however, did touch the outer side of the bank of the widened canal, near where the machine shops and grist mill of the penitentiary stood upon the banks of the old canal. The balance of the forty-five acres described in the act of 1882 was acquired by the State of South Carolina in connection with the Columbia canal under the Sullivan Fenner contract and deeds from other parties. One or two sales or contracts for sale of the Columbia canal had been made by the State of South Carolina, but the property had been reconveyed and on the 24th day of December, 1887, the State of South Carolina was the owner of the canal and its appurtenances, and it was then, and had been since 1882, in the custody of the board of directors of the South Carolina penitentiary for purposes of development, work having proceeded continuously from 1882 up to that date by convict labor and appropriations from the State Treasury. By an Act of the General Assembly, approved on that date, 19 Stats., 1090, entitled "An Act to incorporate the board of trustees of the Columbia canal, to transfer to said board the Columbia canal with the lands now held therewith, and its appurtenances, and to develop the same," the canal was transferred to the board of trustees thereby created. And by an Act approved December 24th, 1890, 20 Stats., page 967, the board of trustees were authorized to sell the property, subject to certain limitations and conditions. On the 11th of January, 1892, the board of trustees so created by the aforesaid Act, pursuant to its provisions, conveyed the canal and its appurtenances to the plaintiff in error. On the 26th day of May, 1892, the board of directors of the South Carolina penitentiary entered into a contract with the defendant in error, under which the works referred to were erected. Abstracts of these Acts of the General Assembly and the contract with defendant corporation are fully set forth in the "Abstract of Case" in the brief of argument for the de-

fendant in error on the motion in this cause to dismiss the writ of error or affirm the judgment of the court below. That motion, under the order of the court, is to be heard in connection with this argument, and reference is craved to the abstract of the case there given.

ARGUMENT.

The two questions which are stated in the beginning of the "Abstract of Case" will now be considered:

I.

Did defendant have the right to place its steam plant where it is as an adjunct to its water wheels? This inquiry again divides itself into two heads:

A. Did the plaintiff in error acquire title in fee to the land in question by the conveyance of the canal?

B. If so, did not the reserved right of the State, conceded by the plaintiff in its complaint, to erect the water station carry with it the right to erect the steam plant as a necessary adjunct?

A.

We submit that the plaintiff did not acquire title in fee to the lands in question.

It will be observed that in the decree of the State Circuit court the judge held: "As to the Rawls deed, that deed conveys the property to the State; but subsequently the State conveyed the canal property to the plaintiff, and thereby conveyed in fee all the property known as the canal property, including its banks as it existed at the time of the conveyance and at the time of the Act of 1887 and of the conveyances made thereunder. The canal property covered the land upon which defendant's works are erected." But defendant in error, who was respondent in the State supreme court, gave notice under the rules governing the practice in those courts, that it would in

the supreme court urge the error in that regard as an additional ground why the order of the circuit court dismissing the complaint should be affirmed.

In the opinion of the Supreme Court, delivered by Associate Justice Gary, it is said: "Even if there was error on his part in his findings of fact, it is not the subject of review by this court in a law case. The court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water power plant, and essential to the enjoyment of its use. For the same reason we cannot review his Honor's findings of fact that the plaintiff is owner in fee of the land described in the complaint, subject to the right of the State to the five hundred horse power of water power." But the chief justice of that court concurred in the result in the following words: "I concur in the result, as I am not satisfied that the plaintiff ever acquired title to the land upon which the works in question have been erected, for this does not depend solely upon the solution of a question of fact, as seems to be supposed." And the other associate justice, Pope, simply concurred in the result.

Counsel for the plaintiff in error, in his argument against the motion to dismiss or affirm, has taken the ground, and will doubtless again take it in his argument on the main issues, that this court is precluded from the consideration of this question by the decision of the State Supreme court upon the matter. We respectfully submit that it is not.

The writ of error has been sued out from this court to the State court to bring the entire record before the court for a full review as to questions of law, not only of the judgment of the State Supreme court, but also the judgment of the Circuit court.

The writ has been granted upon the allegation that the contractural relation exists between the State of South Carolina and the plaintiff in error under the Act of 1887, and this court is called upon to determine whether a contract does exist under that act, what its terms are, and whether it has been violated

by any subsequent Acts of the State Legislature. Therefore, this court is compelled to determine what rights the plaintiff in error did acquire under the Act of 1887? and amongst other questions whether it acquired title in fee to the lands lying between the canal and the river, or whether in the purchase of the canal it acquired simply an easement of the lands covered by the canal and its banks.

In the case of *Eagan* vs. *Hart*, 165 U. S., 188, this court ruled, as it had done in many other cases, "that on error to a State court, this court cannot re-examine the evidence, and when the facts are found below, is precluded by such findings."

It is quite evident that Justice Gary of the State Supreme court conceived the question of the character of plaintiff's title to be one of fact, while Chief Justice McIver conceived it to be one of law, and we think a fair inference is that Justice Pope was of the same opinion. If a question of fact, this court is precluded from its consideration, but it is not precluded by even a unanimous opinion of the State Supreme court that it was a question of fact and not one of law. We submit, there being no dispute as to location or boundaries, and it being a question solely to be determined by public acts of the State Legislature, it is one of law, and not of fact. The only finding of fact in the Circuit court decree was that the works are located on the land covered by the Rawls deed; the Rawls deed called for the Congaree river as its western boundary, consequently running *ad medium filum aquae*, and it will be found from an examination of the Acts of the Legislature upon the subject that it was not intended that any lands in the neighborhood in question should pass with the canal, even if originally acquired for the purposes thereof.

The Columbia canal and its appurtenances was first sold by the State under the Act approved September 21st, 1868, 14 Stats., page 83; but the provisions of that Act are not important for consideration at this time, as the State re-acquired the possession of the canal in 1878, under a contract made with Sullivan

Fenner by commissioners appointed pursuant to the provisions of the A. A., approved March 12th, 1878, 16 Stats., 444.

"THE STATE OF SOUTH CAROLINA.

This agreement between the Columbia Canal Commission, appointed in accordance with the provisions of the Act of the General Assembly, No. 412, approved March 12, 1878, of the first part, and Sullivan Fenner, as assignee and grantee of the Columbia Water Power Company, of the second part, witnesseth, that the said commission, for itself, and Sullivan Fenner, for himself, his heirs, executors, administrators and assigns, do hereby *mutually covenant and agree*:

1. The said Sullivan Fenner to give immediate possession of the Columbia canal, with its appurtenances and the Lynch property adjacent thereto.

The water power of the canal now used in supplying the city of Columbia with water not to be interfered with by the commission, except that the said water may be temporarily interfered with when it is deemed necessary in the development of the canal, in the opinion of the engineer in charge, approved by the commission, and after five days' notice to the corporate authorities of the city of Columbia.

2. The said Sullivan Fenner covenants to execute a warranty title to the State of the aforesaid Lynch property, and, if desired, also to execute a quit claim deed to the said canal and its appurtenances, on being furnished, subject to the terms of the aforesaid Act, with five hundred horse power of water power at Gervais street, for the use of himself, his heirs, executors and assigns.

3. The said Sullivan Fenner to be furnished, for the use of himself, his heirs, executors and assigns, with water power (when developed) at his sites below Gervais street, upon the same terms with other parties, with the right to use the canal and banks adjacent to said sites for purposes connected with the use of the water power furnished and manufacturing pur-

poses at said sites, and with authority, if desired, to widen at his own expense the canal eastward below Gervais street opposite said sites.

In witness whereof, the said commission, by the chairman, under his private seal, attested by the secretary of the said commission, and the said Sullivan Fenner, under his seal, have hereto set and subscribed their names at Columbia, South Carolina, this 25th day of September, A. D. 1878.

THE CANAL COMMISSION,
Per R. L. McCaughrin, Chairman, (L. S.)
SULLIVAN FENNER, (L. S.)
Per S. W. Pearce, Jr., Attorney in Fact.

Attest: John C. Haskell, Secretary.

Signed, sealed and mutually delivered in duplicate before us.

(Signed.) JAMES T. WELLS,
JAMES R. RION.

Under this contract it will be seen that the State not only reacquired the canal and its appurtenances which had been conveyed to Pearce, trustee, but also acquired the Lynch lands, which was a body of land lying between Gervais street, of the city of Columbia, on the south, and the Elisha Daniels, or Rawls, land occupied by the penitentiary, on the north, and between the canal on the east and the river on the west, embracing besides a strip of the main land, several small islands in the Congaree river.

The State continued to hold this property by its commissioners appointed under the Act of 1878 until, under the provisions of the A. A., approved December 28th, 1879,17 Stats., 87, the canal itself was sold to David W. Thompson and Augustus F. Neagle, and that Act it is important for the Court to consider. It provides: "That the said canal commission shall, and they are hereby, authorized to enter into a covenant and agreement on the part and behalf of the State with David M. Thompson and Augustus F. Neagle, their heirs and assigns, to sell and dispose of the property of the State known as the Columbia

canal, with a view to the development thereof, together with the lands held therewith, and all and singular the rights, members and appurtenances thereunto belonging, *except the land along the canal between the head of the Congaree river and the south side of Gervais street, between which points all necessary rights of way for widening and deepening canal, with all roadways necessary on both sides of said canal, shall be granted.*"* * * *

Sec. 3. * * * and the right is hereby granted to widen and deepen the said canal, and change the course thereof in such manner as the said parties may consider necessary for the better development of the said water power.

Sec. 4. That the said parties, their heirs and assigns, shall have *the right of way*, and the same is hereby granted, in and along the said canal, for the construction and operation of the same from the head of the Congaree river, and at all points below Gervais street on the Lexington shore, and on Broad river to the head of the old canal; where any property lying along the said canal or canals shall be held as the private property of any person, the said parties, their heirs and assigns, for the sake of the public improvement contemplated in the construction of the said canal or canals, and the better navigation of the said Congaree and Broad rivers, and the transportation of supplies to market, shall have the right to acquire such rights of way by condemnation and assessment for the uses aforesaid in the same manner as rights of way may by law be now acquired by railroads."

It is clear, under the provisions of this act, that Thompson and Neagle acquired no interest in the land along the canal between the head of the Congaree river and the south side of Gervais street, but only "such rights of way for widening and deepening the canal, with all roadways necessary on both sides of the canal." The custody of the lands thus excepted from the grant, was not in the act or elsewhere specially provided for, and, therefore, under Sec. 60 of the General Statutes of 1882, passed into the custody of the Commissioners of the

Sinking Fund and became clearly separated from the canal itself. That section provides:

"Section 60. The Secretary of State shall take charge of all property of the State, the care and custody of which is not otherwise provided for by law. He shall hold the same subject to the direction and instruction of the Commissioners of the Sinking Fund * * *."

By the Act of the General Assembly, approved 9th February, 1882, 17 Stats., 855, it was provided: "That the canal commission * * * be, and they are hereby authorized and directed to transfer and deliver to the Board of Directors of the South Carolina penitentiary the property known as the Columbia canal, together with the lands *held therewith*, and all and singular the rights, members and appurtenances thereto belonging, which was acquired under and by virtue of the act above entitled, and the *contract by them entered into with Sullivan Fenner in pursuance of said act*, on the 25th day of September, A. D. 1878: *Provided*, That nothing herein contained shall authorize any action by the canal commission until a release has been executed to the State of all the right, title and interest in the *property above described* of Messrs. Thompson & Neagle or of any other parties holding any interest therein.

"Sec. 2. That the said board of directors are hereby authorized and directed, on behalf of the State, to take into their possession the said property, with its appurtenances; and for the purpose of providing *an adequate water power for the use of the penitentiary, and for the other purposes to be hereinafter named*, they are authorized, empowered and directed to improve and develop the same."

* * * * * * * * * * *

"Sec. 4. That the said *board of directors shall have the right of way*, and the same is hereby granted, in and along the said canal, for the *construction* and *operation of the same*; and if, in enlarging and developing the said canal, or in constructing the said dam, it become necessary to use the private property of any

person or corporation for that purpose, the said board of directors, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the said Broad and Congaree rivers, and the transportation of supplies to market, shall have the right to acquire such right of way in manner now provided by law."

On the same day, by A. A., 17 Stats., 873, it was provided: "That the commissioners of the Sinking Fund be, and they are hereby, authorized and directed to transfer to the board of directors of the State penitentiary all *that tract of land measuring and containing about forty-five acres, and lying between the canal and the Congaree river, and between Neagle's bridge and Broad River bridge, together with certain small islands adjacent thereto, and to put them in possession of the same.*

Sec. 2. That the said tract of land shall be *used* by the said board of directors of the State Penitentiary for such *purposes incident* to the *maintenance* and development of the State penitentiary as they may deem proper."

This was the land which it is seen above had been separated from the canal in part, upon the conveyance to Thompson & Neagle, and included in its description is the land now in question. It is clear that the board of directors of the penitentiary, although, under the provisions of the two acts, which, being on their passage through the Legislature at the same time, must be construed together, they would be custodians of the lands thus separated from the canal, as well as of the canal and its appurtenances, were custodians in different rights; they held the canal and its appurtenances for development; they held the lands described for the maintenance and development of the State penitentiary; in their custody of the canal, having only the right of way, for the construction and operation of the canal, through the lands held for the uses of the penitentiary.

By A. A., approved December 24, 1887, 19 Stats., 1090, the board of directors were required to transfer to the board of trustees of the Columbia canal, not the penitentiary or

any lands held by the board for the use thereof, but only "the property known as the Columbia canal, together with the *lands now held therewith,* acquired under the Acts of the Legislature of this State with reference thereto or otherwise." And the board of directors subsequently deeded the property to the board of trustees, using the descriptive terms provided in the Act. By that deed, then, only such lands passed as were covered by both elements of the description—that is to say, lands that had been acquired for the purposes of the canal, either under the A. A. or by contract, as for instance, the contract with Sullivan Fenner, and which were, at the time of the passage of that Act, *still* held with the canal as appurtenant thereto. Now, at the time of the passage of that act, we have seen that the lands in question first had never been acquired for the *purposes of the canal,* nor were they then *held in connection therewith,* but had been acquired and were then held for the *purposes* of the penitentiary. So they no more passed under that deed to the board of trustees than did the land upon which the buildings and walls of the penitentiary itself are located, and the land still remains the property of the State of South Carolina. By Section 4 of the Act it was provided that "the said board of trustees *shall have the right of way,* and the same is hereby granted, in and *along said course of the canal, for the construction and operation of the same,*" and by the grant of the canal only an easement in the lands passed.

The subsequent A. A., approved December 23, 1890, simply authorizes the board of trustees to sell the canal with the land which had been conveyed to it by the board of directors before the completion of the canal, and is not important for consideration as to what land passed with the canal.

It is needless for us to say that this action is based upon an allegation of seizing in fee by the plaintiff of the lands in question, and cannot be maintained by proof only of an easement, for in the latter case the question would be whether there

had been any obstruction of the user of the easement, not whether there had been any trespass upon plaintiff's lands.

B.

However, if this court shall differ with us as to this point our second query is, did not the reserved right of the State, conceded by the plaintiff in its complaint, to erect the water station, carry with it the right to erect the steam plant as a necessary adjunct? It was so held by his Honor, the presiding judge, who found as a matter of fact: "Now, has the defendant the supplementary right to put in a steam plant? Prudence and foresight justifies its erection on the banks of a canal along a river where freshets come; and where time is important there might be serious interruption to the industries of the defendant company, and thus of the penitentiary; therefore, the defendant has a right to use so much steam plant as is necessary to supplement its water power at such times as the water power is unavailable by reason of freshets or necessary repairs to the canal, or other causes. The dam may break, rains may swell the river, and there might be a long interruption of the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water power plants. The defendant cannot erect any more steam plant than is necessary for it to use as a supplement to the water power which it has received from the State."

In its complaint plaintiff alleges, paragraph II, "That subsequent to said notification the defendant, acting as the duly authorized agent of the State, through the board of directors of the penitentiary, submitted specifications and plans for the construction and erection of a plant or works for obtaining, or producing, or making available the said water power, and the plaintiff did approve the same, as not taking more or less embankment of land than was necessary for the development or obtaining the five hundred horse power of water power

for the use of the State, and did allow the defendant, as the agent of the said State, to proceed with said work, for the purpose of developing the said water power, as it was the intention, purpose and desire of the plaintiff to perform all of the conditions, obligations and terms of the said Act of the General Assembly of the State of South Carolina authorizing the sale of the said property, as it is its purpose and desire now to do; and, as plaintiff is informed, said work and construction was carried on and conducted, on behalf of the State, to its completion, in accordance with the plans and specifications as submitted."

The State Supreme Court held, "It is contended that said contract did not confer upon the defendant the right to erect the steam plant. This depended upon the fact whether it was merely incidental to and essential to the enjoyment of the use of the water power plant. The parties to the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand was made therefor on circuit, nor was there an exception raising such question. This court must assume that the Circuit Judge properly decided all questions of fact upon which his judgment had necessarily to rest. Even if there was error on his part, in his findings of fact, it is not the subject of review by this court in a law case. This court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water power plant and essential to the enjoyment of its use."

II.

Is the defendant making an improper use of the water power reserved by the State? We say that it is not. We think that the whole question is to be determined by the construction of the A. A. of December 24, 1887, 19 Stats., 1,090, above referred to, and his Honor, the Circuit Judge, was of the same opinion.

By that Act it will be seen that the State was transferring from herself to the board of trustees of the Columbia canal for the benefit of the city of Columbia a most valuable property, without any consideration whatever, except the use of the water power, which was reserved under the provisions of the act, which are as follows:

"Sec. 2. That the said board of trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an *adequate water power for the use of the penitentiary,* and for *other purposes* hereinafter named, they are hereby authorized, empowered and directed to improve and develop the same. * * *

Sec. 7. That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water 150 wide at the top, 110 feet wide at the bottom, and 10 feet deep, from the source of the canal down to Gervais street, and furnish *to the State, free of charge, on the line of the canal, 500 horse power of water power,* to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the canal commission, and to furnish the city of Columbia 500 horse power water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as it is practicable, complete the canal down to the Congaree river, a few yards above the mouth of Rocky branch, *Provided, that the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment, or other transfer of the said canal by the said board of trustees or their assigns shall always be subject to this right.*

"Sec. 8. That in order to secure and aid the speedy completion of the canal, from its source to Gervais street, *for furnishing the said water power to the State* and to the city of Columbia, the board of directors of the South Carolina penitentiary shall furnish to the order of the said board of trustees such convicts as may, from time to time, be in the penitentiary unemployed

and not under contract, and are now allowed by law to be employed or worked outside of the walls of the penitentiary."

In *Slidell* v. *Grandjean*, 111 U. S., at page 329 (L. C. P. Ed.), the rule applicable to the construction of this act is thus laid down: "It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. *Charles River Bridge Co.* v. *Warren River Bridge*, 11 Pet., 536; *R. R. Co.* v. *Litchfield*, 23 How., 88 (64 U. S., XVI, 509); *the Delaware Railroad Tax*, 18 Wall., 206 (85 U. S., XXI, 888). The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act and thus sanctions only open dealing with legislative bodies."

In the case of *Grant* v. *Leach*, 20 La. An., 329, s. c. 96 Am. Dec., 403, it was ruled: "Reasonable doubts as to proper construction of legislative grants are to be resolved in favor of the State, and if it is susceptible of two meanings, that construction is to be adopted which works least harm to the State." See the same ruling by this court in *Chicago Bridge Co.* vs. *Binghampton Bridge Co.*, 3 Wallace, 51.

Especially is this true when the consideration reserved is a merely nominal one. The act we are now considering must be construed as constituting a power of attorney prescribing the conditions upon which the board of directors of the penitentiary, a public board, were to transfer the property to the board of trustees of the Columbia canal, a quasi public board. Unless

its provisions were capable of being performed, and were actually performed, there was no power in the board of directors to make the transfer. Its provisions constituted conditions precedent to the transfer of the property, and were to be liberally construed, not strictly, as with conditions subsequent. In other words, if the board of directors of the penitentiary could not, and did not, reserve to the State of South Carolina, "*free of charge on the line of the canal, 500 horse power of water power,*" and if that obligation was not imposed upon the board of trustees, by section 7 of the act itself, then the board of directors had no authority, under the act, to transfer the title of the property. The State has indicated her purpose of having the 500 horse power free of charge, and also "that the right of the State to the *free use* of said 500 horse power shall be *absolute* and any mortgage, assignment, or other transfer of the said canal by the said board of trustees, or their assigns, shall always be subject to this right," a qualification attaching to every transfer that was made. If an individual should give to another a power of attorney to transfer an estate upon condition that the attorney should reserve to him the use of a stream of water upon such terms as would indicate, without question, his intention to have an easement, or a right in gross, of an inheritable character, and the attorney could not draft a conveyance by which such purpose could be accomplished, then the power of conveying the estate would not become operative. It is given him to perform an act only upon the performance of a condition precedent, and if the condition precedent is, or becomes impossible, the power itself falls to the ground.

Moreover, the board of trustees were a quasi public body, upon whom duties to the public were imposed. It was made their duty, not a matter of discretion, to complete the canal, and likewise to furnish the water power to the State and the other parties named in the Act. This was a duty which could have been enforced against them by the public, and a wilful failure to perform would have subjected them to indictment. Now,

by the act authorizing the board to make the sale under which plaintiff claims, the purchaser was to take the property subject, not to easements and water rights reserved, but "*subject to all the duties and liabilities*" imposed by the act constituting the board, amongst them the public duty of furnishing to the State the 500 horse power of water power, which duty would be enforcable by indictment or mandamus. The argument of counsel for appellant as to the rights of dominant and servient tenements have no application to the case.

When, therefore, the State declared in the Act of 1887 that her right to the use of the 500 horse power should be absolute she clearly meant to reserve the right to dispose of it as she pleased.

"Absolute," says Rapalje & Lawrence (Law Dict.), "means complete, final, perfect, unconditional, unrestricted," as quoted and applied in *Fuller* vs. *Missroom*, 35 S. C., 330. In the Century Dictionary, vol. 1, p. 21, we read: "ABSOLUTE: 1. Free from every restriction; unconditional. * * * 2. Perfect; complete; entire; possessed as a quality in the highest degree." And then among the illustrations we have: "Absolute estate, in law, an unqualified, unconditional estate, entitling the owner to immediate and unlimited possession and dominion." In Worcester's Unabridged Dictionary we read: "ABSOLUTE: 1. Clear from other things; independent of anything else; perfect in itself; unrestricted; unlimited; complete."

Plaintiffs contended that this right of the State to water power is an incorporeal right—an easement for the penitentiary—that it cannot be assigned or leased. We reply, that if the canal had been completed in 1887, the Legislature would have reserved this water power to herself in the language of the act of 1879, but the canal was not completed, there was no water in it, and hence there was at that time no water power. The State parted with this valuable property on condition that the quasi public "board of trustees" would create this water power, and would, when it was created, turn over 500 horse

power of this water power, issuing out of the thing granted, to the State for its free and absolute use—not *for* the penitentiary, but *at* the penitentiary, for the use of the State. If it be an incorporeal right, it is not an easement reserved only for the penitentiary. It is the property of the State, and, therefore, the State can do with it as she pleases. She may use it as she uses her phosphate beds—receive a part made available in consideration of the other part being used by the grantee or lessee or license for his own purposes as his compensation. In short, if plaintiff is right in his contention, even then his position can be sustained only by giving to the word "absolute" the meaning of "perpetual," or some other definition so unusual as not to find any place in so high an authority as "Worcester's Unabridged Dictionary," in violation of the rule laid down in *Slidell* v. *Grandjean* 111 U. S., 437—if, indeed, there can be any doubt that "absolute" means "unconditional," "unlimited," "unrestricted."

The State of South Carolina owned the canal and her legislature had sovereign power to create new characters of estates or modify old ones and could make easements in gross inheritable or assignable. The canal itself was a quasi corporate or ideal thing, irrespective of its ownership, and was not held as an incident to an estate in lands, but all lands connected with it were held as an incident to it. Indeed, it was capable of existence and transfer independently of an estate of any character in a single foot of land. The value of the canal was the water power it was capable of furnishing and the reservation of a definite amount of water power was a reservation of a proportionate interest in the principal thing itself.

An incorporeal right if inheritable is an incorporeal hereditament; and the word "absolute" imports inheritance. *Fuller* v. *Missroom*, 35 S. C., 330, and cases there cited. We do not deem it necessary to go into the very nice learning which distinguishes a reservation from an exception, or whether this reservation or exception of water power, if an easement is an ease-

ment appurtenant or in gross; for whatever it be, the State has the absolute use of it, and may do with it as she pleases. If, however, there is any desire to pursue the investigation, a full discussion of it will be found in the cases of *Haggerty* v. *Lee*, 54 N. J. L., 580 (25 Atl. Rep., 319), and *Chaflin* v. *R. R. Co.*, 157 Mass., 489 (32 N. E. Rep., 659), and in a full note to these two cases as republished in 21 L. R. A., pps. 631-641. To accede to plaintiff's position would be to hold that the State, holding absolutely a property capable of developing 10,000 horse power of water power could not dispose of the greater part of it, and reserve a portion to herself, which reserved portion she could so use as to get the benefit of a part thereof without expense, by allowing another party to use the remainder of this reserved portion in providing the State with her needed part, and with a money income besides. It would be, to further hold that the State could not utilize the power of which she retained the absolute use, unless she expended herself a considerable sum of money in erecting a power plant; in other words, that she could not allow a use of her water power as compensation to one who would render such water power available to her. And that is all that has been done by the contract assailed in this case. The State has not sold her reserved water power, nor assigned it, nor even leased it out for a money consideration only; she has more properly contracted for its development by allowing only the use of part, so that she might receive the other part for her own purposes without expense, and for a money consideration besides.

But as matter of law, the right to use water as a generator of power is not always strictly an easement which is "a privilege or convenience which one neighbor has of another without profit," (Angell Water Courses, Sec. 142), but is the service *aquachaustus* of the civil law, or right of profit, or *profit a pendre* of the common law (Ibid., 143). As Judge Foster puts it, in *Goodrich* v. *Burbank*, 12 Allen, 459: "It seems to be held uniformly, that if enjoyed in connection with a certain estate, they

are regarded as easements appurtenant thereto; but if granted to one in gross, they are treated as an estate or interest in land, and may be assignable or inheritable." See several other cases cited in notes to section 143 of Angell.

On page 13 (x 10) of Washburn on Easements, the author says: "If the easement consists of the right of *profit a prendre*, such as taking soil, gravel, minerals and the like from another's land, it is so far of the character of an estate or interest in the land itself, that if granted to one in gross it is treated as an estate and may, therefore, be one for life or inheritance. But if it is an easement proper, such as a right of way and the like, and is granted in gross, it is a mere personal interest and is not inheritable." And in a note the author says: "The above positions are approved by Sharswood, J., in *Tinicum Fishing Co.* v. *Carter*, 61 Penn. St., 39." Mr. Washburn pursues this subject through four pages and cites and quotes from several cases in support of his proposition, that a grant of the right to use water to one in gross creates an estate that is assignable and inheritable. Thus in *Goodrich* v. *Burbank*, *supra*, the grant of a right to draw water from a spring on the land of grantor by means of an aqueduct was assignable. See, too, *Poull* v. *Moakley*, 33 Wisc., 482, "that an easement of a canal is assignable, though not appurtenant to any estate." And the language quoted from the court in *Hall* v. *Ionia*, 38 Mich., 493: "The value of water as a distinct inheritance has been recognized in all periods, and its ownership is well established as not dependent upon lands to which it may be appurtenant, but as having a separate and distinct importance." And from *Goodrich* v. *Burbank*: "We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power, and the right to take it from a spring in a pipe for domestic purposes."

There is no difference in the law applicable to artificial channels through which a natural stream is diverted (as in the case

at bar) and to natural streams. *Dunklee* v. *R. R. Co.*, 24 N. H., 506; Angell Waterc., Sec. 540.

"*Profit a prendre* is a right to take either the fruit or products of the land of another, or the materials which constitute it. This right of *profit a prendre*, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate. Where the right of *profit a prendre* belongs to an individual, distinct from ownership in other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement, and may be held in fee, for life, or for years. *Profits a prendre* differ from easements, in that the former are rights of profit and the latter are mere rights of convenience without profit. But the principal distinction is between easements and *profits a prendre* in gross, the latter being held independently of any dominant estate, whereas for the existence of an easement, two estates, the dominant and servient, are necessary. *Profits a prendre* are acquired by grant or prescription, and never by custom." 19 Am. & Eng. Enc. of Law, p. 259. See, too, *Hall* v. *Ionia*, 38, Mich., 493, and especially pages 498-9; *Boist* v. *Empie*, 1 Selden, 33; *Owen* v. *Field*, 102 Mass., 107-8; *Amidon* v. *Harris*, 113 Mass., 63; *Hill* v. *Shorey*, 42 Vt., 614. See, too, Gould on Waters, Sec. 299, on page 562, where it is said: "So the privilege of laying pipes in another's land for the purpose of taking water and of entering upon the land to lay, repair or renew such pipes, is an interest in the realty which is assignable, descendable and devisable, when the grant contains words of inheritance." And in the case at bar these rights of entering, laying pipes and taking water have been conceded, and were rights reserved to the State by law. Angell Waterc., Sec. 158.

We cannot enforce this idea more forcibly than by quoting from the language of the State Supreme Court in this case. It says:

"Having reached the conclusion that the State is not an in-

dispensable party in determining this cause of action, the next question for consideration is whether or not the contract between the State and the defendant relative to the 500 horse power of water power is null and void.

"This contract received legislative consideration when it was ratified by the act of the legislature hereinbefore mentioned, and although such construction is not binding on this court, still it shows the intention of the State when it reserved the 500 horse power of water power.

"We think the construction placed upon said contract in 1892 by the Legislature as to the 500 horse power reserved to the State was in harmony with the terms of said contract, the provisions of Section 7 of the Act of 1887 being that the right of the State to the free use of the said 500 horse power should be absolute.

"The use of the word 'absolute' was for the purpose of creating a right in the State to this 500 horse power separable and distinct from the ownership of other lands and not dependent upon any particular land to which it may be appurtenant.

"This reservation was a right of *profit a prendre.* Campbell, C. J., in delivering the opinion of the Court in *Hall* v. *City of Ionia et al.*, 38 Mich., 423, says: 'There is no foundation for the claim that a right to the perpetual use of the water must be dependent upon a particular estate with which it is connected. Some confusion has, perhaps, been caused by an attempt among writers to create symmetry in the law by putting all rights connected with land or springing from them into classes, and by speaking of these particular rights as easements, which very commonly requires both a dominant and servient estate.

"But every right of property must usually have some peculiar qualities of its own, which must not be destroyed by inappropriate attempts to classify it with different kinds. The old maxim *omnis definitio periculosa* is especially true when things of essentially different qualities are placed together under one head.

"The value of water as a distinct inheritance, either for creating power or for other purposes of use or consumption, has been recognized in all periods, and its ownership is well established as not dependent on lands to which it may be appurtenant, but as having a separate and intrinsic importance.

"There may be an occasional dictum and possibly some decisions to the contrary; but most cases where any doubt seems raised on this question will be found to rest on peculiar facts which in no way involve the general doctrine. The facts are often such as to confine the use of water not only to special places, but also to specified purposes; but this limited use is the exception and not the rule,' citing a number of authorities. Proceeding, he says: 'Experience has shown that in many instances the right to use and dispose of water may not only be more valuable than any land which is occupied for its gathering and disposal, but it is also a special value to be taken to a distance and parcelled out among several users or occupants. Water works are only made available by the sale of water to consumers, and valuable water power is frequently distributed among several mills in large and small quantities and may not be used by the owner at all.

"The ownership of it cannot be confined to the right in the nature of a license, and is as well recognized a title or interest of a real nature as land itself, without some use of which it could not be made available.

"Foster, J., in speaking for the Court in *Goodrich* v. *Burbank*, 12 Allen, 459, uses this language: 'The water itself may not be the subject of property, but the right to make it and to have pipes laid in the soil of another for that purpose and to enter upon the land of another to lay, repair and renew such pipes is an interest in the realty assignable, descendible and devisable.' On this subject the language of Judge Curtis is as follows: 'I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water

from it by pipes to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house; but these may be acquired afterwards. Incorporeal rights may be inseparably annexed to a particular messuage or tract of land by the grant which creates them and makes them incapable of separate existence, but they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land and again severed therefrom by a conveyance of the messuage or land without the right or a conveyance of the right without the lands.'

"*Lonsdale Co.* v. *Moiese*, 21 Law Rep., 664: * * * 'We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power and the right to take it from a spring in a pipe for domestic purposes, watering of cattle, or to supply an artificial jet or fountain, and to sell it to any others for any uses they may desire to make of it.' "

The following authorities will also throw light upon the subject:

Tinicum Fishing Co. v. *Carter*, 61 Penn. St., 39.
19 Am. & Eng. Enc. of Law, p. 259.
Gould on Waters, Section 299, p. 562.
Poull v. *Mockley*, 33 Wis., 482.
Washburn's Easements & Servitudes, Section 12 and 17a.
Angell on Water Courses, Section 143.

We are of the opinion that the contract between the State and the defendant was not null and void.

Counsel for plaintiff, however, urge that the Legislature has indicated its purpose to reserve this 500 horse power for the use of the penitentiary. But it will be seen that the only mention of the penitentiary in connection with the use of the water power is found in Section 2, above quoted, where it is

said: "For the purposes of navigation, for providing an adequate water power for the use of the penitentiary *and for other purposes hereinafter named,* they are hereby authorized, empowered and directed to improve and develop the same." Then in Section 21 it is that the board of trustees "may sell or lease the power of the canal, subject to such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power at the penitentiary."

Now, there is nothing in either of these provisions to indicate that the use which the State was to make of the 500 horse power was to be measured by the necessities of the penitentiary. It is true that it was provided for the penitentiary and other purposes, and it was provided at the penitentiary, but the right of the State to its free use was still to be *absolute.*

We think this is the proper view of the act of 1887 when taken alone, but we think that the view is strengthened when we consider all the acts upon the subject of the canal as in *pari materia.* It will be observed that whenever the State was itself contemplating the continuous ownership of the canal and its development and utilization by its own agencies it provides only for the reservation of such water power as would be adequate for the uses of the penitentiary. But whenever she contemplated the transfer of the property to another, she provides for the absolute use for herself of a fixed and definite amount of water power. The A. A. of December 23d, 1879, 17 Stats., 87, contemplating a transfer of the property, provides:

"Section 5. That in consideration of the public improvement and general benefit aforesaid, and the use *by the State of fifteen hundred horse power of water power between the city water works and Senate street, to be used as hereinafter provided,* the city of Columbia is hereby authorized to enter into an obligation to hold the said parties, their heirs and assigns, harmless as against all damages done from the acquisition of all rights of way between the head of Congaree river and Gervais street, on the Columbia shore, and against the flowage of all low lands and

back water above the dam so to be constructed across the Congaree."

Then in Section 9 prescribes:

"Sec. 9. That the said parties, their heirs and assigns, in consideration of the rights and franchises herein granted, shall, within the period of three years from the date of said contract, complete the construction of the dam or dams and the bulkheads as hereinbefore provided and shall complete the canal or canals, from the said bulkheads down to the quarry situate upon what is known as the Kinsler tract, about seven-eighths of a mile below Gervais street, said canal on the Columbia shore to be so constructed as to develop 15,000 horse power, and they shall have in operation within the time aforesaid one cotton mill of 16,000 spindles, and *they shall* give to the State, between the Columbia Water works and Senate street, *fifteen hundred horse power of water power, to be used or disposed of in such manner and on such terms as the State may direct.*"

By the A. A. of February 9, 1882, 17 Stats., 855, however, where it was contemplated that the State should continue to own the canal, and that it should be developed by the board of directors of the penitentiary, it was provided in Section 2:

"Section 2. That said board of directors are hereby authorized and directed, on behalf of the State, to take into their possession the said property, with its appurtenances; and for the purpose of providing *an adequate water power for the use of the penitentiary, and for the other purposes to be hereinafter named,* they are authorized, empowered and directed to improve and develop the same."

And in Section 6 it is provided:

"Section 6. That the board of directors are authorized to furnish to the city of Columbia, for the purpose of operating its water works, and other purposes, five hundred horse power of water power; and to Sullivan Fenner, under his contract with the canal commission, five hundred horse power of water power; and after reserving for the use of the penitentiary a power

sufficient to meet the demands of its ordinary operations, and other industries conducted and carried on within its walls, they are further authorized, with the comptroller general, on behalf of the State to lease to other persons or corporations water power upon such terms and upon such annual rental per horse power as in their judgment may be proper; and also to lease such mill sites along the line of the said canal, as may be owned by the State, upon such terms as may be deemed most advantageous to the interest of the State."

Then, when the board of directors are authorized by the A. A. of December 24, 1887, 19 Stat., 1090, to transfer the property from the State, the language used by the Legislature recurs to an absolute reservation of a fixed amount of water power for the State, irrespective of the amount that might be required by the penitentiary, and says that it is to be "absolute." And, inasmuch as there was no express repeal of the A. A. of February 8th, 1882 (17 Stat., 855), the use that the State was to make of her water power so reserved was to be determined by reference to Section 6 of that Act, that is to say: "After reserving to the use of the penitentiary," out of said five hundred horse power "a power sufficient to meet the demands of its ordinary operations, and other industries conducted and carried on within its walls, they are further authorized, with the comptroller general, on behalf of the State, to lease to other persons or corporations water power," etc. This seems to have been the view of the board of directors of the penitentiary and the comptroller general in executing the contract with defendant. (See printed record, pp. 16-19).

Suppose, however, that the State contemplated a reservation of 500 horse power for the use of the penitentiary, is she to be restricted to any particular use by the penitentiary, and was it not competent for the board of directors of the penitentiary to contract for the development of the water power as it has done with the defendant in this case? How can it be said that it is any less a use of the penitentiary for the defendant to develop

the water power and use a part of it for its own purposes in consideration of the development, than it would be for the State herself, out of the funds appropriated for the penitentiary, to pay for its development? And could she not sell or lease the electric power developed thereby, as it now sells or leases its manufacturing power within the walls of the penitentiary itself? Is there anything in the law which prevents the board of directors from utilizing the convict labor in manufacturing outside of the walls of the penitentiary, or from selling the productions of its convicts? If not, certainly it cannot be said that there is anything which prevents them from selling or disposing of the products of its water power reserved for the purposes of the penitentiary in the shape of electric power developed. By what tribunal is it to be determined what are penitentiary uses? Is it not the Legislature? And has not this been determined by the A. A., approved December 24, 1892, 21 Stats., 94? See brief of argument for motion to dismiss or affirm, pp. 11-12 where the Act is quoted.

WM. H. LYLES,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 312.

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY LIGHT AND POWER COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of South Carolina, at Columbia, S. C.

BRIEF OF ARGUMENT OF WM. H. LYLES FOR MOTION TO DISMISS OR AFFIRM, IN REPLY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 317.

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error,
vs.
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of South Carolina, at Columbia, S. C.

The record shows that only two questions are presented in the State courts, to wit:

1. Whether the State of South Carolina, through her board of directors of the penitentiary, could make such a contract as was made with the defendant for the use of the five hundred horse power of water power reserved for the State under the Act of 1887.

2. If so, whether the reserved right of the State entitled the defendant to erect a steam plant on the banks of the canal as subsidiary to its water power plant.

No amount of argument can bring before the court any other question.

Plaintiff's complaint admitted the right of the State to the five hundred horse power of water power, and admitted the right of the defendant to erect its water power plant where it is. This being so, and the right of the defendant having been passed upon by the State courts simply upon a construction of the Act of 1887, it is respectfully submitted that it was simply the case of a junior and senior grant, and the plaintiff's right was decided only upon local laws.

In the *Missouri Pacific Rwy. Co* v. *State of Nebraska*, 164 U. S., 403, this Court has said:

"The Supreme Court of Nebraska has construed this statute as authorizing the board of transportation to make the order questioned in this case, which required the railroad company to grant to the relators the right to erect an elevator upon its right of way at Elmwood Station on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon. The construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the constitution of the United States. *Chicago, M. & St. P. R. R. Co.* v. *Minnesota*, 134 U. S., 418, 458 (33-970), 3 Inters. Com. Rep., 209; *Illinois C. R. Co.* v. *Illinois*, 163 U. S., 142, 152, 41 L. Ed., 107-110."

In the case of *F. G. Oxley Stave Co.* v. *County of Butler*, 166 U. S., 649, the Court rules: "The validity of subscriptions by a county court to the stock of a railway company, and of a conveyance to that company, and the matter of fraud in a decree, are questions of local law or practice on which the judgment of a State court cannot be re-examined by this Court."

The very language of the State court in the case now under review indicates that it was in no way controlled by the Act of 1892. The Court here says (printed Record, page 31):

"This contract received legislative construction when it was ratified by the act of the legislature hereinbefore mentioned and although such construction is not binding on this Court, still it shows the intention of the State when it reserved the five hun-

dred horse power of water power. We think the construction placed upon said contract by the legislature as to the five hundred horse power of water power reserved to the State was in harmony of the terms of said contract, the proviso to Sec. 7 of the Act of 1887 being that the right of the State to the free use of the said five hundred horse power of water power would be absolute."

If this be true as to the right to the use of the water power itself, the question as to the right to erect a steam plant cannot be considered by this Court, for it is clear that that was a question of fact, and decided as such by the State courts, where it is said: "It is contended that said contract did not confer upon the defendant the right to erect a steam plant. This depended upon the fact whether it was merely incidental to and essential to the enjoyment and use of the water power plant. The parties to the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand was made therefor on circuit, nor was there an exception raising such question. This Court must assume the circuit judge properly decided all questions of fact upon which his judgment had necessarily to rest. Even if there was error on his part in his findings of fact, it is not the subject of review in this Court in a law case. This Court, then, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water power plant, and essential to the enjoyment of its use."

In *Egan* v. *Hart*, 165 U. S., 188, it is said, after reciting the facts decided by the Court below:

"Now, the foregoing findings by the trial court, approved and affirmed by the Supreme court of Louisiana, that is, the non-navigability of the stream, and the concurrent participation by the United States and the State in the building of the dam, are purely questions of fact, and, therefore, as we have said, are conclusive.

"It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any Federal question, that we are without jurisdiction, although the State court may have also decided such a question. *Eustis* v. *Bolles*, 150 U. S., 361 (37: 1111); *Connecticut, New York & N. E. R. Co.* v. *Woodruff*, 153 U. S., 689 (38: 869); *Hammond* v. *Connecticut Mut. F. Ins. Co.*, 150 U. S., 633 (37: 1206)."

WM. H. LYLES,
Counsel for Defendant in Error.